(1) Supreme Court, U.S.
FILED
01117 JAN 27 2002
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

H. LEE BARFIELD II
Counsel of Record
Bass, Berry & Sims PLC
315 Deaderick Street, Suite 2700
Nashville, TN 37238
(615) 742-6200

JAMES F. BLUMSTEIN
Vanderbilt University
School of Law
209-B Law Building
Nashville, TN 37240
(615) 322-2613

Attorneys for Petitioner

---

148 pp

QUESTIONS PRESENTED

1. The Content-based Regulation Issue

Whether, on its face or as applied, a regulatory recruiting rule of a secondary school athletic association that operates under color of state law, *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n,* 531 U.S. 288 (2001), which bans the use of "undue influence" on any student "by any person connected, or not connected" with a school to secure or retain a student "for athletic purposes" and which rule, further, has been interpreted in controlling guidelines blanketly to prohibit, *per se*, all school-initiated, targeted communication with or solicitation of prospective students and, more specifically, to prohibit "[d]iscussion of financial aid based on need with any prospective student/athlete by any member of the coaching staff," App. at 7-B, and therefore is "directed to communicative activity as such," *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775 (2002)(slip op. at 6), is a viewpoint-based (*see Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)) or a content-based regulation subject to strict scrutiny under the First Amendment (as the district court held), or whether, as the court of appeals held, such a rule is a "manner" restriction subject to intermediate scrutiny because, by faulty analogy to this Court's "secondary effects" cases, the ban contained in the recruiting rule "does not constitute a total ban on communications between secondary schools and prospective students regarding athletic programs" and allows other modalities of communication for schools to provide prospective students with information "about the academic, athletic, and spiritual aspects of the educational experience," *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n,* 262 F.3d 543, 552 (6th Cir. 2001). *See Reno v. ACLU*, 521 U.S. 844, 879-80 (1997).

2. The Excessive Discretion Issue

Whether, as the district court held, use of the terms "undue influence" and, as a definition of that term, "appropriate or normal," in the recruiting rule, especially when linked to a totally discretionary and standardless administrative waiver authority, App. at 6-D, vest unbridled discretion in regulatory officials in violation of the First Amendment. *See Forsyth County v. The Nationalist Movment*, 505 U.S. 123, 129-33 & n.10 (1992); *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775 (2002)(slip op. at 7-9).

3. The Facial Challenge Issue

Whether, as the court of appeals held, in a facial challenge based on the First Amendment, "the challenger must establish that no set of circumstances exists under which the [challenged provision] would be valid," *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 555 (6th Cir. 2001)(quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)), or whether a plaintiff in a First Amendment context can facially challenge a regulation that, in validly regulating non-expression, infringes on "a substantial amount of speech that is constitutionally protected," or a regulation that "delegates overly broad discretion to the decisionmaker." *See Forsyth County v. The Nationalist Movment*, 505 U.S. 123, 129-30 (1992).

4. The "Pure Speech" Issue

Whether, under *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1761 (2001), or the anti-solicitation cases, a state regulatory entity can bar and punish "the fact of communication," not just some "separately identifiable conduct," *Cohen v.*

California, 403 U.S. 15, 18 (1971), when that communication provides truthful information about underlying conduct that is itself permitted under the regulatory regime.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL & STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 8

I. The Issues Are Of National Importance Because Of Their Potential Impact On School Choice 8

II. The Analysis And Decision Of The Court Of Appeals Raises And Cuts A Broad Swath Through Fundamental First Amendment Doctrine And Is In Substantial Tension With Decisions Of This Court 15

A. Content-Neutrality And Secondary Effects In General 15

B. The Anti-Solicitation Issue 18

C. Content Neutral v. Content-Based Regulation: The Issues 19

D. Content Neutrality: The Identity Of The Speaker Issue 25

E. The Facial Challenge Issue 26

F. The "Pure Speech" Issue 30

CONCLUSION 30

APPENDICES

APPENDIX A: Opinion of the Sixth Court of Appeals (Aug. 23, 2001) .. 1A

APPENDIX B: Order and Memorandum of the U.S. District Court For the Middle District of Tennessee (July 2, 1998)...1B

APPENDIX C: Order of the Sixth Circuit Court of Appeal denying rehearing *en banc* and Mandate.....1C

APPENDIX D: Relevant Excerpts from TSSAA Bylaws 1D

APPENDIX E: Brief of Amici Curiae Chester E. Finn, Jr. and Daniel Casse In Support of Plaintiff/ Appellee Brentwood Academy's Petition For Rehearing *En Banc*..... 1E

APPENDIX F: Constitutional and Statutory Provisions..... 1F

APPENDIX G: Summary of Characteristics Of Recruiting Rule 1G

TABLE OF AUTHORITIES

FEDERAL CASES

Bartnicki v. Vopper, 121 S. Ct. 1753 (2001) 30

Boos v. Barry, 485 U.S. 312 (1988) 11, 24

Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 13 F. Supp.2d 670 (M.D. Tenn. 1998) 1, 25

Brentwood Academy v. TSSAA, 180 F.3d 758 (6th Cir. 1999) 7

Brentwood Academy v. TSSAA, 262 F.3d 543 (6th Cir. 2001) 1, 3, 4, 5, 8, 9, 17, 20, 21, 22, 27, 29

Brentwood Academy v. TSSAA, 531 U.S. 288 (2001) 1, 2, 7

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 27, 28

Carey v. Brown, 447 U.S. 455 (1980) 20, 26

Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 3, 16, 20, 22

Cohen v. California, 403 U.S. 15 (1971) 30

Consolidated Ed. Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) 20

Erie v. Pap's A.M., 529 U.S. 277 (2000)..... 17, 18

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)... 5, 10, 25

Forsyth County v. The Nationalist Movment,
505 U.S. 123 (1992)..... 3, 4, 11, 23, 26, 27, 28, 29

Ladue v. Gilleo, 512 U.S. 43 (1994)..... 3, 6, 11, 15,16

Lakewood v. Plain Dealer Publ'g Co.,
486 U.S. 750 (1988)..... 19, 26, 28, 29

Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993)..... 15

Linmark Assoc., Inc. v. Willingboro,
431 U.S. 85 (1977)..... 9, 16, 22, 23

Magee v. United States, 93 F. Supp.2d 161 (D.R.I. 2000)
..... 30

Martin v. Struthers, 319 U.S. 141 (1943) 23

Members of the City Council v. Taxpayers for Vincent,
466 U.S. 789 (1984)..... 4, 26, 28

Meyer v. Grant, 486 U.S. 414 (1988) 22

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 12, 13

NAACP v. Button, 371 U.S. 415 (1963)..... 19

N.Y. State Bar Ass'n v. Reno,
999 F. Supp. 710 (N.D.N.Y. 1998)..... 30

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 12, 13

In re Primus, 436 U.S. 412 (1978) 10, 19, 24

R.A.V. v. St. Paul, 505 U.S. 377 (1992) 14

Regan v. Time, Inc., 468 U.S. 641 (1984) 21

Reno v. ACLU, 521 U.S. 844 (1997) 10, 16, 22, 24

Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 21, 22, 23, 24

Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) 3, 10, 18, 22

Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1979) 3, 18

Schneider v. State, 308 U.S. 147 (1939) 10

Secretary of State v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984) 9, 18

Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 20

Stanley v. Georgia, 394 U.S. 557 (1969) 14

Thomas v. Chicago Park Dist., 122 S. Ct. 775 (2002) 9, 10

Thomas v. Collins, 323 U.S. 516 (1945) 19, 23

Thornhill v. Alabama, 310 U.S. 88 (1940) 26

United States v. Playboy Ent. Group, Inc., 529 U.S. 803 (2000) 10, 11, 20, 21, 23

United States v. Salerno, 481 U.S. 739 (1987) 27

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 11

Watchtower Bible & Tract Society v Stratton,
240 F.3d 553 (6th Cir. 2001)..... 27

FEDERAL STATUTES

42 U.S.C. §1983 ..... 1, 2

28 U.S.C. § 1254(1) 1

28 U.S.C. §§1331 and 1343 2

PETITION FOR WRIT OF CERTIORARI

Petitioner Brentwood Academy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1A-25A), upon remand from this Court's decision, *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n,* 531 U.S. 288 (2001), was entered on August 23, 2001, and is reported at 262 F.3d 543 (6th Cir. 2001). The order of the court of appeals denying the petition for rehearing *en banc* was entered on October 29, 2001. App. 1-C. The opinion of the United States District Court for the Middle District of Tennessee, granting Petitioner's motion for partial summary judgment and issuing a permanent injunction, is reported at 13 F. Supp.2d 670 (M.D. Tenn. 1998) (App. 3B-61B).

JURISDICTION

The court of appeals entered its judgment on August 23, 2001. Petitioner timely filed a petition for rehearing *en banc* on September 6, 2001. On October 29, 2001, the court of appeals issued its order denying Petitioner's petition for rehearing *en banc.* App. 1-C. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent portions of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 are set forth in Appendix F.

STATEMENT OF THE CASE

The constitutional issue in this matter is Petitioner's facial and as applied First Amendment free speech challenge to the Recruiting Rule of the Tennessee Secondary School Athletic Association (TSSAA). The case is brought under 42 U.S.C. §1983, and federal jurisdiction exists under 28 U.S.C. §§1331 and 1343.

Petitioner is a co-educational, independent, college-preparatory school. Like its counterparts in most states, Respondent TSSAA is a nominally private association composed primarily of public schools and local public school officials and governed exclusively by public high school principals, assistant principals or certain qualified public school superintendents. TSSAA coordinates, supervises, and regulates interscholastic athletic competition among both public and private high schools in Tennessee. In a proceeding before this Court last Term, the regulatory conduct of TSSAA was held to constitute state action, thereby subjecting that conduct to the strictures of the First and Fourteenth Amendments. *See Brentwood Academy v. TSSAA,* 531 U.S. 288 (2001)

TSSAA's Recruiting Rule, which is similar to comparable rules in most states, bars independent schools from taking the initiative in contacting or communicating with prospective student-athletes individually. While the general prohibition contained in the rule bars the use of "undue influence" for "athletic purposes," interpretive guidelines bar school-initiated, targeted "contact" for any reason. App. at 6-10-B.

The district court held that the Recruiting Rule was a content-based regulation of non-commercial speech that violated the First Amendment both facially and as applied. The district court also held that the use of terms "undue influence" and "normal and appropriate" in the Recruiting Rule conferred "unbridled discretion to penalize those

expressing points of view with which it disagrees," and "permits the TSSAA to engage in arbitrary and discriminatory enforcement – precisely the claim made by Brentwood Academy in this case." App. at 55-B & n.27. That "unbridled discretion" facially violated the First Amendment under *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 129-33 & n.10 (1992).

In reversing, the Court of Appeals for the Sixth Circuit held that the Recruiting Rule was a content-neutral "manner" regulation subject to intermediate scrutiny. 262 F.3d at 552. Even though the Recruiting Rule prohibits school-initiated targeted communication or solicitation, thereby "foreclos[ing] an entire medium of expression" (a "particular concern" of this Court's decisions, *see Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)), the court of appeals characterized the rule and its anti-solicitation features as a "limitation on the manner in which secondary schools can communicate with students about their athletic programs." 262 F.3d at 552. *But see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 628-32 (1979)(holding that solicitation is a form of expression within the protection of the First Amendment); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 788 (1988)(restrictions on solicitation subject to "standard First Amendment analysis," *i.e.*, strict scrutiny). Since "other outlet[s] for providing ... information to prospective students" are available, the court of appeals held, the Recruiting Rule is not content-based regulation and is subject to intermediate rather than strict scrutiny. 262 F.3d at 552. *But see Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993)(determination of whether a regulation of speech is content-based is made "regardless of whether or not it leaves open ample alternative channels of communication" and availability of such alternative channels of communication cannot serve as the basis for characterizing a regulation of speech as a "manner restriction"); *Riley*, 487 U.S. at 791 ("[G]overnment, even

with the purest motives, may not substitute its judgment as to how best to speak for that of speakers and listeners").

The court of appeals also rejected the facial claim under the excessive-discretion principle, criticizing the district court for not "focusing on how the rule was applied to Brentwood." 262 F.3d at 556. Contrary to the express teaching of *Forsyth County* – that a facial challenge on the ground of excessive decisionmaking discretion turns not "on the facts surrounding any particular ... decision" but on whether "there is anything in the [regulation] preventing" the improper exercise of discretion, 505 U.S. at 133 n.10 – the court of appeals focused on how the rule was applied in this specific case, thereby rejecting the facial excessive-discretion challenge. *But see Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)(allowing facial First Amendment challenge when "recognized First Amendment protections of parties not before the Court," such as prospective students who have First Amendment interests as listeners, will be "significantly compromise[d]").

The Recruiting Rule. TSSAA's Recruiting Rule bars the use of "undue influence" on a student or the parents or guardians of a student "to secure or retain a student for athletic purposes." The rule's prohibition extends to students "with or without an athletic record" and applies to "any person connected, or not connected, with the school," App. at 6-B, apparently applying to barbers or other local merchants unaffiliated with a school.

The term "undue influence" is defined as "exceeding what is appropriate or normal." App. at 6-B. The terms "appropriate or normal" are not defined. App. at 38-B. Instead, the Recruiting Rule sets forth a number of examples of conduct that is considered "undue influence" *per se*.

These *per se* rules flatly prohibit independent schools from taking the initiative in communicating with or contacting prospective student-athletes individually for any reason. App. at 40-B. Private or parochial schools may not

contact students enrolled at public schools; public schools may not contact private school students. App. at 8-B.

The flat ban also restricts who can speak on behalf of a school, stating that "a coach may not contact a student or his or her parents prior to his [or her] enrollment in the school."[1] App. at 6-B. Further, the rule restricts who can discuss financial aid with prospective students. No member of a coaching staff may discuss need-based financial aid with any prospective student "until the student has enrolled in school (attended 3 days of school)." App. at 7-B. As the district court found, "any school representative, including a member of the coaching staff, is prohibited from making an 'initial contact' with prospective student-athletes outside the 'feeder pattern' for ***any*** reason" until the student has attended 3 days of school. App. at 40-B (emphasis in original). The court of appeals acknowledged that the Recruiting Rule was a "prohibition on coaches, coaching staff, and school representatives from initiating contact with ... students for the purposes of recruiting student athletes." 262 F.3d at 552. The district court found that the Recruiting Rule's "ban has the effect of preventing ***any*** influence on a student, not just 'undue' influence." App. at 48-B (emphasis in original).

TSSAA by-laws provide discretion to the Executive Director to waive the Recruiting Rule "when in his opinion the rule fails to accomplish [its] purpose." App. at 6-D. The *per se* rules provide specific examples of impermissible activity but do not limit the discretion of TSSAA in enforcing the underlying "undue influence" standard. The *per se* prohibitions are also subject to discretionary waiver by the Executive Director. The district court found that TSSAA "retains unbridled discretion" to "use the Recruiting Rule to arbitrarily suppress speech in violation of the First Amendment." App. at 55-B.

---

[1] *Cf. First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785 (1978)(A state may not dictate "the subjects about which persons may speak" or control the "speakers who may address a public issue").

One other feature of the Recruiting Rule bears emphasis. In general, contact with prospective students may not be initiated "by any person connected, or not connected, with the school." App. at 6-B. A broad exception applies to "feeder pattern" schools with whom far-reaching initial and targeted contact is permitted without restraint. App. at 7-8-B. Thus, particular speakers and relationships are favored under the Recruiting Rule by the "feeder pattern" exception. The "feeder pattern" exception does not typically apply to private schools, such as Petitioner.[2] TSSAA has "not explained the purpose for the feeder school exception" – why purported interests it has in enforcing the prohibitions of the Recruiting Rule do not apply to recruiting by representatives of "feeder pattern" schools.[3] App. at 47-B.

Concern about this type of exemption "is firmly grounded in basic First Amendment principles." Such an exemption, in this situation favoring public schools and certain types of private schools, may "give one side of a debatable public question an advantage in expressing its views to the people" (viewpoint discrimination) or it may allow government to select the "permissible subjects for debate" (content-based discrimination). *See Ladue v. Gilleo*, 512 U.S. 43, 51 (1994)(internal quotes omitted).

The Recruiting Rule Violation. The district court held the Recruiting Rule unconstitutional on its face and as applied. The "as applied" violation stemmed from a letter sent in April 1997 by Petitioner's head football coach to all

---

[2] A "feeder pattern" exists where a middle school sends a large number of students to a particular high school each year. The term "feeder pattern" is not defined in the TSSAA rules. App. at 40-B.

[3] The district court made the following observation about the "feeder pattern" exception: "If conveying information to student-athletes about opportunities to attend out-of-zone schools is harmful to these students, the logical conclusion is that these students would also be harmed through recruiting by representatives of 'feeder schools.' The TSSAA cannot have it both ways." App. at 47-48-B.

new incoming male students. App. at 13-B. The letter was purely informational; it set forth the dates in May for spring football practice and invited the students to attend if interested. The letter was sent only to new students who had already applied, been accepted for admission and signed a contract to attend Petitioner the next fall. App. at 13-B. The letter was followed by a telephone call to each of the students to reaffirm that participation in spring practice was entirely optional. App. at 14-B. The students receiving the letters were entering high school and, therefore, had to change schools as they were graduating from middle school.

TSSAA rules allow the students who received the letters and calls to participate in spring practice. App. at 13-B. Sending the letters and making the telephone calls constituted the rule violation. It was legal for the incoming students to participate, but illegal for the school to communicate about the practice with those students. The specific language of the communications was not relevant to the violation. The fact of the communication itself constituted the rule violation. App. at 12-13-B.

Despite finding that there was "no indication of a deliberate intent to violate TSSAA rules by Brentwood Academy officials," TSSAA severely punished the school's entire athletic program. App. at 17-18-B & n.1.

In reversing the district court, the Sixth Circuit held that TSSAA's regulatory conduct was not state action and stated that federal courts "are not super-referees over high school athletic programs;" complaints "are to be resolved among the membership of the TSSAA, not in the federal courts." 180 F.3d 758, 766. This Court reversed last Term. 531 U.S. 288 (2001).

In its initial decision, the court of appeals recognized that "Brentwood has made strong arguments that the rule is vague and not well-tailored to the perceived evil sought to be avoided, which in turn may lead to arbitrary enforcement." 180 F.3d at 766. Upon remand from this Court's reversal of

its state action holding, the same panel found (on the same record) that Petitioner's same First Amendment facial challenges "strain[] credulity." 262 F.3d at 557.

This Petition ensues. Petitioner requests this Court once again to review an important and profoundly erroneous decision of the court of appeals, a decision that cuts a broad swath through fundamental First Amendment doctrine. As stated by national education experts Chester E. Finn, Jr. and Daniel Casse, App. 1-E, the court of appeals has "misperceived the importance of the issues raised and tended to view the case – somewhat dismissively – as merely a high school sports case." But the importance of the issues far transcends athletic eligibility, reaching "to the heart of ... access to quality education and school choice." And "the particular method of resisting access to educational... choice – the suppression of speech – is peculiarly odious ... because it suggests that government somehow has a right to expect students to attend (and play sports for) public schools." But "children are not the property of the state," App. at 8-9-E, and cannot be forced to attend "feeder pattern" schools.

The hostility of the speech-suppressive aspects of the Recruiting Rule to students' choice of secondary school "is palpable in the regulation under challenge," but government should not be able to "stifle access to educational opportunity through censorship." App. at 8-9-E. The threats to core First Amendment doctrine are manifold and far transcend the arena of high school athletics.

REASONS FOR GRANTING THE PETITION

I. THE ISSUES ARE OF NATIONAL IMPORTANCE BECAUSE OF THEIR POTENTIAL IMPACT ON SCHOOL CHOICE.

1. TSSAA's Recruiting Rule substantially restricts the ability of independent and parochial schools to

seek out students by informing them of educational opportunities. It also makes it more difficult for students and parents to learn about alternative educational options, including financial aid. The *per se* proscriptions on school-initiated targeted communication are "directed to communicative activity as such." *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775 (2002) (slip op. at 6). "[T]here is no core of easily identifiable and constitutionally proscribable conduct" that the speech-related *per se* rules address. *See Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 965-66 (1984).

The rule shuts down an important mode of communication on the part of schools. "That the proscription applies only to one mode of communication ... does not transform this into a 'time, place, or manner' case." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). This critical principle was ignored by the court of appeals, which believed that the existence of "multiple ways of communicating" with prospective students did transform this case into a "manner" case subject to intermediate rather than strict scrutiny. 262 F.3d at 552.

By requiring students to take the initiative in contacting schools before schools are permitted to communicate with students, the rule compromises prospective students who are "not deliberately seeking ... information." *Linmark*, 431 U.S. at 93. By prohibiting targeted school-initiated communication and channeling communications to general advertising or "supply[ing] information that real estate agents may give to new families moving to the community," 262 F.3d at 552, the rule mandates options for communication that are less effective and "involve more cost." *Linmark*, 431 U.S. at 93.

The impact of TSSAA's Recruiting Rule far transcends the athletic context since the rule applies to athletes and non-athletes alike and restricts both school representatives and unaffiliated persons. Unless an

independent school is willing to avoid interscholastic athletics or to ban students it recruits generally from interscholastic athletics, the school (and the potential students) are compromised.

By implementing the various speech-related bans on student recruitment – and focusing on students with and without an athletic record – TSSAA is limiting opportunity, not guarding against "undue influence."

The influence TSSAA is concerned with is that students and their families may learn of appealing educational opportunities, and about financial aid availability that can open wide a door of opportunity that might otherwise be slammed shut. TSSAA has described its concern about "undue influence" as relating to the "influence that letters and personal telephone calls from ... one of America's best high school football coaches, could have on an eighth grade student-athlete." Sixth Cir. App. at 605 The letter itself – the "communicative activity as such," *Thomas v. Chicago Park Dist.*, 122 S. Ct. 775, (slip op. at 6), the identity of the communicator,[4] *First National Bank v. Bellotti*, 435 U.S. 765, 785 (1978), and the chosen "modalit[y]" for communication,[5] *Reno v. ACLU*, 521 U.S. 844, 879 (1997), not any overreaching element of the letter – is the basis of the violation. *See In re Primus*, 436 U.S. 412, 437 (1978).

Such is the "undue influence" that concerns TSSAA; it has only been explained in terms that demonstrate the fear that youngsters might actually be exposed to and then act on

---

[4] See *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 812 (2000)("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles").

[5] *Cf. Schneider v. State*, 308 U.S. 147, 163 (1939)(leafletting ban held invalid as "one is not to have the exercise of ... expression in appropriate places abridged on the plea that it may be exercised in some other place").

ideas and opportunities of which they may not be aware. But such a rationale or justification, which focuses on a "concern for the effect of the subject matter on young [listeners]," *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 811 (2000), is not "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)(internal quote omitted). The Recruiting Rule's understanding of "undue influence" and its rationale for the flat ban on school-initiated targeted expression "focus[] only on the content of the speech and the direct impact that speech has on its listeners." *Boos v. Barry*, 485 U.S. 312, 321 (1988). That is the "essence of content-based regulation." *Playboy*, 529 U.S. at 812. *See also Forsyth County*, 505 U.S. at 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation").

Nothing in this case relates to threats, intimidation, coercion, or other such overreaching tactics that can be and should be prohibited. But, as the district court found, such critical interests are not what the Recruiting Rule aims to achieve. Rather, the rule seems driven by the fear that students who learn of attractive educational options will actually embrace those options. Information that can lead listeners – students and their families – to action poses the danger of "undue influence" in the eyes of TSSAA.

The exemptions to these bans for schools (largely public schools and certain private schools) that have "feeder patterns" are otherwise inexplicable. *See Ladue v. Gilleo*, 512 U.S. 43, 51 (1994)(explaining how concerns about "an exemption from an otherwise permissible regulation of speech" are "firmly grounded in basic First Amendment principles"). In "feeder pattern" situations, the speech-restrictive *per se* prohibitions of the Recruiting Rule have no application whatsoever; even threatening, harassing or other overreaching behavior is not subject to the *per se* ban on school-initiated individualized contact.

These realities led the district court to conclude that the Recruiting Rule's "ban has the effect of preventing ***any*** influence on a student, not just 'undue' influence." The district court cogently asserted that "TSSAA needs to go back to the drawing board and start over." App at 48-B. The court of appeals misapprehended just what is at stake, missing the mark by a wide margin on these critical issues.

2. A concern with public education has been the occasional mind-set that the public schools have a proprietary interest in the students of a community. But government does not own students who might otherwise attend public schools. It cannot commodify students because public school coaches or fans want to use their talents to win football championships, even at the expense of the child's overall welfare. Maintaining a competitive balance in athletics is not a legitimate basis for suppressing speech and thereby restricting educational opportunity for students. The district court saw this point but the court of appeals did not.

Properly understood, the role of public schools is to provide a service to students, affording them an opportunity for advancement. A risk is that the community and its public educators can get the sequence backwards, seeing students as objects for use by the state to achieve communal goals. Rather than focusing on the students and promoting their best interest, government and those acting on its behalf have sometimes taken steps deemed in the communal interest that are, unfortunately, at the expense of the educational opportunity of individual students. That treats students as creatures of the state – a means to a communal end.

Cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), however, teach that the liberty of the student and the student's family is the appropriate unit of concern and is afforded constitutional primacy. Government cannot constrain what a student learns. Parents, not the state, ultimately control the nature and scope of educational

opportunity for children, at least outside the public school curriculum. There are limits to how far states can go "to foster a homogeneous people." 262 U.S. at 402. When Oregon required all students to attend public schools, this Court pointedly observed that "[t]he child is not the mere creature of the State" and that the state had no "general power ... to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535.

In the current context, TSSAA has apparently determined that independent schools pose a threat to public education. Rather than viewing independent schools as a means of enhancing educational options available to the students of the state – placing more choices on the educational menu for students and their families – TSSAA has sought to circumscribe and even foreclose opportunities for many youngsters who may not be aware of independent school alternatives or who may mistakenly believe that independent school enrollment is financially unattainable.

In this scenario, independent schools are misperceived as a threat to the community rather than an alternative opportunity for the community's students. Independent schools, it is feared, may lure students ("our students") away from public schools with an adverse impact on certain aspects of the public system (*e.g.*, the ability of public schools to field championship sports teams).

Instead of acting in the students' best interests by encouraging communication about educational opportunities, TSSAA views students as a means to an end – a sports championship for a public school. This treats students as objects, as "mere creature[s] of the state," which *Pierce* forbids. That approach turns the role of government – facilitating educational opportunities for youth – on its head, and disrespects the primacy of student/family choice.

Even though students have a constitutionally-protected interest in attending independent schools (*Pierce*), in participating in athletics as a subject of education in an

independent school (*Meyer*), and in receiving information about independent school opportunities (*Stanley v. Georgia*, 394 U.S. 557, 564 (1969)), TSSAA flatly bars any independent school from "contact[ing] students enrolled at the public schools." App. at 8-B. TSSAA assumes that it is appropriate and desirable to establish and maintain a sort of Berlin Wall around public school students, ostensibly protecting them against the undefined use of "undue influence," but in reality inhibiting parents and students from learning about educational options they have a right to discover and embrace. *Cf. R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992)(government may not regulate based on hostility or favoritism towards underlying message expressed).

This forms the essence of the district court's holding that TSSAA "does not have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school." App. at 45-46-B. Indeed, the "State's interest . . . is the reverse. The State has a profound interest in students making informed choices about education." *Id.* at n.18. As the district court so cogently put it, "it is simply not the business of the State to stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side . . . by suppressing the speech of the other. . . . TSSAA cannot control school choice through censorship." *Id.* at 46-B.

This Court should again review this case because of the importance of the issues to school choice and because of its potential implications for First Amendment doctrine.

II. THE ANALYSIS AND DECISION OF THE COURT OF APPEALS RAISES AND CUTS A BROAD SWATH THROUGH FUNDAMENTAL FIRST AMENDMENT DOCTRINE AND IS IN SUBSTANTIAL TENSION WITH DECISIONS OF THIS COURT.

The decision of the court of appeals raises – and its analysis cuts deeply into the marrow of – foundational First Amendment doctrine. For a summary, see Appendix G.

A. Content-Neutrality and Secondary Effects

At the most basic level, the court of appeals misconceived the inquiry surrounding the threshold determination of whether the Recruiting Rule is a content-based (or even a viewpoint-based[6]) regulation. That inquiry is a threshold one of singular importance in that it determines the level of scrutiny to be applied. *Ladue v. Gilleo*, 512 U.S. 43, 59 (1994)(O'Connor, J. concurring). Content-based regulations are "presumptively impermissible, and this presumption is a very strong one." *Id.*

The court of appeals concluded that the existence of alternative channels of expression for schools (as speakers) and students (as listeners) meant that the Recruiting Rule is not a content-based regulation. That is, the rule is not content-based ***because*** alternative channels exist for communication. This gets the analysis wrong and misperceives this Court's "secondary effects" cases.

This Court has "voiced particular concern with laws [such as TSSAA's ban on school-initiated targeted communication] that foreclose an entire medium of expression." *Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). This is true even if such a ban is "free of content or viewpoint discrimination." *Id.* The First Amendment danger posed by

---

[6] *Cf. Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387 (1993)(school district rule that barred use of school premises "for religious purposes" was viewpoint discrimination).

such prohibitions is that "by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* That is one clear concern with the Recruiting Rule's *per se* bans. Even without reference to the content basis of the regulation, the *per se* bans pose substantial First Amendment concerns. They are regulations of communicative activity as such and are subject to strict scrutiny for that reason alone.

The court of appeals here contends that, despite the restrictions on communicative activity contained in the *per se* prohibitions, the existence of alternative channels for communication transforms the analysis from a standard First Amendment strict scrutiny approach into a "manner" framework under intermediate scrutiny. That contention was made but not addressed in *Ladue* – that the regulation under review was a "mere regulation of the 'time, place, or manner' of speech because [potential speakers] remain free to convey their desired messages by other means." *Id.* at 56.

In *Reno v. ACLU*, 521 U.S. 844 (1977), the government asserted this theory. In response, this Court stated that a time, place or manner analysis is "inapplicable" when a regulation is content-based. *Id.* at 879-80. That is, contrary to the position of the court of appeals in this case, a regulation of expression – of communicative activity itself – does not become a "manner" regulation "because" it permits ample alternative channels of communication. The inquiry regarding the content-basis of a regulation of expression must be made on other, independent grounds. As this Court pointed out, the government's position in *Reno* was "equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books." *Id.* at 880. *See also Discovery Network*, 507 U.S. at 430 (a content-based regulation of expression cannot be justified as a time, place, or manner restriction "regardless of whether or not it leaves open ample alternative channels of communication"); *Linmark*, 431 U.S. at 94 (ban on "only one mode of communication ... does not transform [a ban on

residential for-sale signs] into a 'time, place, or manner' case").

Under the court of appeals' analysis of the content-basis of the Recruiting Rule, a regulation will be considered a "manner" regulation (and not a content-based regulation) if it only bars entirely one modality of speech while leaving open alternative channels of communication. For this theory, the court of appeals relied on a faulty analogy to this Court's "secondary effects" cases. 262 F.3d at 553-54.

The court of appeals fundamentally misread the "secondary effects" cases, interpreting the principle of those cases as follows: "As long as the zoning ordinance did not ban the existence of [the theatres in question] outright, the Supreme Court found it to be content neutral." *Id.* at 553. Since the Recruiting Rule "does not completely ban all communications between coaches and prospective students," the court of appeals concluded, the rule was a "content-neutral regulation analogous to" the "secondary effects" cases. This was true even though the Recruiting Rule concededly "prohibit[s] the coaches and those acting on their behalf from initiating the contact." *Id.*

But this analysis misses the core ingredient of the "secondary effects" cases – that the basis of the regulation is not the speech itself but the effects on a neighborhood from adult entertainment venues. Neither the court of appeals nor TSSAA has articulated just what those secondary effects are (or could be) given that all communication, not just overreaching contact, is prohibited. The district court concluded that, under the circumstances, it was and could only be a concern with the "primary effect" that underlay the ban on school-initiated targeted communication – namely, that students who are exposed to information about attractive educational options might select a school other than one in his or her "feeder pattern." *Cf. Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (regulation of the "primary effects of ... expression"

focuses on the "effect on the audience" of the message itself). Such regulation is content-based and presumptively unconstitutional because "the government's interest is related to the content of the expression." *Id.* at 289.

The existence of alternative modes or channels of communication does not influence the threshold determination whether the regulation is content-based. It is relevant in ascertaining whether a regulation justified by its focus on "secondary effects" is, under the less strict standard of review applicable to those cases, compatible with the First Amendment. The court of appeals took great liberties with the "secondary effects" doctrine. If allowed to stand, the court of appeals' analysis of the "secondary effects" issue will spawn rotten analytical fruit well beyond the context of high school athletics regulation.

B. The Anti-Solicitation Issue

The Recruiting Rule restricts all school-initiated, targeted communication with non-matriculated students. Akin to "pure speech," this anti-solicitation provision is subject to strict scrutiny.

The court of appeals viewed the anti-solicitation provision as a "manner" restriction, subject to intermediate scrutiny. This position is in considerable tension with this Court's charitable solicitation cases, which demonstrate that the court of appeals' view of the ban on solicitation "represents a far too limited view" of the cases "relevant to ... soliciting by ... charitable organizations." *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628 (1980).

Under the charitable solicitation cases, "solicitation and speech" are "deemed so intertwined," *id.* at 631, that restrictions on solicitation are "entitled to the protections of the First Amendment." *Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 959 (1984). "[S]tandard First Amendment analysis" applies, *Riley*, 487 U.S. at 788, since charitable solicitation "is protected speech." *Id.* at 789.

The First Amendment protects "more than abstract discussion, unrelated to action." It guarantees an "opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). Requiring a speaker to wait to speak until he or she is addressed first, as the Recruiting Rule does, is incompatible with that fundamental principle. Strict scrutiny applies to the regulation of speaker-initiated non-commercial speech. *See In re Primus*, 436 U.S. 412, 432 (1978)(regulation of solicitation "must withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights'"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (same). "Broad prophylactic rules," such as the Recruiting Rule, "are suspect.... Precision of regulation must be the touchstone." *Id.*

TSSAA's ban on school-initiated, targeted communication is regulation of speech itself. The "manner" of solicitation is subject to content-neutral regulation, but the solicitation itself, as protected speech, may not be banned as a "manner" regulation. As speech or advocacy, solicitation is fully protected by the First Amendment; when "to this [First-Amendment-protected] persuasion other things are added which bring about coercion," then government may regulate such "other things." *Thomas v. Collins*, 323 U.S. at 537. TSSAA prohibits school-initiated, targeted communication itself, not focusing on "other things" that it might be able to regulate or prohibit. *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 768-69 (1988)(rejecting "manner" characterization as "linguistic prestidigitation" when "activity" being regulated is "constitutionally protected").

C. Content-Neutral vs. Content-Based Regulation: The Issues

The court of appeals reversed the holding that the Recruiting Rule was content-based regulation subject to

strict scrutiny. The court of appeals could "not see how the recruiting rule ... bans the substantive content of any particular message." 262 F.3d at 552. The court conflates the concepts of content-based and viewpoint-based regulation.

"The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic [or subject matter]." *Consol. Ed. Co. v. Pub. Serv. Comm'n,* 447 U.S. 530, 537 (1980). Such regulation is subject to strict scrutiny. *Id.* at 536. "It is ... no answer ... that [the Recruiting Rule] does not discriminate on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message." *Carey v. Brown*, 447 U.S. 455, 462, n.6 (1980). Whether animus exists toward specific ideas is not critical; discriminatory treatment is not suspect "only when [government] intends to suppress certain ideas.'" *Discovery Network*, 507 U.S. at 429.

In general, the Recruiting Rule bars the use of "undue influence," including First-Amendment-protected speech, "to retain a student for athletic purposes." More specifically, "[d]iscussion [by the coaching staff] of financial aid based on need with any prospective student/athlete" is prohibited prior to a student's actual enrollment in school ("attended 3 days of school"). App. at 7-B. Other topics of communication are permissible, but speech related to "athletic purposes" or financial aid is barred.

This is classic content-based regulation since the definition of permitted expression rests on the subject matter (albeit not the viewpoint) of the expression. *See, e.g., Playboy*, 529 U.S. at 811("The speech in question is defined by its content... 'sexually explicit adult programming'"); *Discovery Network*, 507 U.S. at 429 ("[T]he very basis for the regulation is the difference in content between ordinary newspapers and commercial speech"); *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116

(1991)(Son of Sam law "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content"); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (When "one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message ... in the one is newsworthy or educational while the message imparted by the other is not," that "cannot help but be based on ... content").

The court of appeals seeks to avoid this analysis by noting that the Recruiting Rule does not absolutely "prevent" school representatives "from discussing the entire topic of its athletic programs." 262 F.3d at 552-53. School representatives are only prohibited from "initiating contact with students or their parents prior to enrollment in the school." There are "other outlet[s] for providing such information to prospective students." *Id.* at 552. The rule, like the zoning ordinance in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), does not "completely ban all communications between coaches and prospective students, but does keep them 'at a distance' by prohibiting the coaches ... from initiating the contact." 262 F.3d at 553. The court of appeals' analysis does not comport with this Court's controlling doctrine.

1. This Court has rejected the court of appeals' distinction between a burden on speech and a total ban on speech. In *Playboy*, the government argued that the challenged statute burdened but did not ban speech. This Court stated that "[i]t is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree.... [C]ontent-based burdens must satisfy the same rigorous scrutiny as ... content-based bans." 529 U. S. at 812.

2. The existence of alternative channels for communication is irrelevant in the face of censorship of

certain speech "modalities." In *Reno*, 521 U.S. at 879, the government argued that censorship "on many of the Internet's modalities ... is nonetheless constitutional because it provides a 'reasonable opportunity' for speakers to engage in restricted speech on the World Wide Web." As explained earlier, this Court rejected that defense as "equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books." *Id.* at 880. Yet, that is the panel's position. *See Discovery Network*, 507 U.S. at 430 (content-based regulation subject to strict scrutiny "regardless of whether or not it leaves open ample alternative channels of communication").

3. The existence of alternative modalities of communication is immaterial because the "government ... may not substitute its judgment as to how best to speak for that of speakers and listeners." *Riley*, 487 U.S. at 791. "The First Amendment protects [the] right not only to advocate [a] cause but also to select what [the advocate] believes to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). That government "leaves open 'more burdensome' avenues of communication, does not relieve its burden on ... expression." If, as here, regulation is content-based, the degree of scrutiny is not relaxed because "other avenues of expression remain open." *Id.*; *cf. Linmark*, 431 U.S. at 93 (ban on residential "for sale" signs invalid; "newspaper advertising and listing with real estate agents" [the options enumerated by the court of appeals, 262 F.3d at 552] "involve more cost" and are "less likely to reach persons not deliberately seeking ... information").

4. The court of appeals' reliance on *Renton* is misplaced for two reasons.

(a) It conflicts with the solicitation/leafleting cases, which protect the right of speakers to initiate communication. The Recruiting Rule impermissibly prohibits school-initiated contact "even though the recipient of the literature ... is in fact glad to receive it" (the situation

herein). *Martin v. Struthers*, 319 U.S. 141, 144 (1943) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that ... it must be fully preserved"). The "manner" of speaker-initiated expression is subject to regulation, but a ban on such speech (as in the Recruiting Rule) under the guise of a "manner" regulation violates the First Amendment as a "naked restriction on the dissemination of ideas." *Id.* at 146-47. Under the First Amendment, government just cannot order a would-be speaker to refrain from speaking until someone else initiates the conversation or even to require a speaker to secure government permission before seeking to persuade a listener. *Thomas v. Collins*, 323 U.S. at 540. Yet this is what the Recruiting Rule does and what the court of appeals upholds.

(b) As explained earlier, *Renton* relied on a secondary effects theory. While the regulation applied only to a particular category of speech, its justification had nothing to do with that speech. The content of the speech was irrelevant and was not the regulation's target.

TSSAA's ban on school-initiated, targeted communication with prospective students cannot be justified based on *Renton* because TSSAA is concerned about the effects (the "undue influence") of the speech on the prospective students who are targets of the communication. These are "primary" effects, a fear that such communication "will cause those receiving the information to act upon it" in a way TSSAA deems inappropriate. *Linmark* 431 U.S. at 94 (ban on residential "For Sale" signs to promote racially stable neighborhood violates First Amendment). As the district court held, regulation on the basis of such "primary" effects is content-based, subject to strict scrutiny. *See Forsyth County*, 505 U.S. at 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation"); *Playboy*, 529 U.S. at 811 (When the "overriding justification for the regulation is concern for the effect of the subject

matter on young viewers," it is content-based regulation subject to strict scrutiny); *Reno*, 521 U.S. at 867-68 (law "to protect children [on the Internet] from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech," is a content-based regulation).

Boos v. Barry, 485 U.S. 312 (1988), a case not considered by the court of appeals, demonstrates the erroneousness of the court of appeals' approach to the secondary effects issue. This Court noted that "[r]egulations that focus on the direct impact of speech on its audience [such as the Recruiting Rule] present a different situation" than that in *Renton*. *Id.* at 321.

"Listeners' reactions to speech are not the type of 'secondary effects' ... referred to in *Renton*." *Id.* Thus, if the Renton zoning ordinance "was justified by the city's desire to prevent the psychological damage ... associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate" because that type of regulation "targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech." *Id.*

TSSAA's concern about "undue influence" focuses on the "direct impact of a particular category of speech" on the listener, not on some "secondary effect" of that type of speech unrelated to the content of the speech itself. *Cf. In re Primus*, 436 U.S. at 431-33 (holding ban on non-commercial solicitation, to prevent "undue influence," subject to strict scrutiny). The Recruiting Rule is content-based regulation of expression subject to strict scrutiny and cannot be justified under *Renton*'s "secondary effects" rationale. The "manner" in which solicitation is carried out can be regulated, but solicitation, as a form of speech, cannot be banned.

5. The "manner" of solicitation can be regulated to combat "undue influence" in the sense of "overreaching, misrepresentation, invasion of privacy," *id.* at 435, or threats,

coercion, or harassment. 13 F. Supp.2d at 689. What the First Amendment prohibits is "control[ling] school choice through censorship." *Id.* To the extent that TSSAA's interest is in guarding not against "undue influence" but "unduly effective influence," that goal butts into the First Amendment. School-initiated, targeted communication to non-matriculated students "may influence the outcome" of a student's decision whether or not to attend a particular school. "[T]his would be its purpose." But "the fact that advocacy may persuade ... is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978). TSSAA may not "restrict the speech of some [members] in order to enhance the relative voice of others." That is "wholly foreign to the First Amendment." *Id.* at 790-91. To the extent that the "feeder pattern" exception favors one set of speakers/listeners or enhances the "relative voice" of those speakers, that provision is in tension with the First Amendment principles embraced in *Bellotti*.

D. Content-Neutrality: The Identity of the Speaker

The Recruiting Rule bans contact by a coach with a student or a student's parents prior to that student's "enrollment" in the school. The ban applies "to all students whether or not they have an athletic record." The rule controls who can speak for a school, a form of content-based regulation.[7] *Id.* at 785 (control over the identity of the "speakers who may address a public issue" is content regulation subject to strict scrutiny). The "feeder pattern" exception, which allows coaches and other school representatives to communicate with impunity with students

---

[7] The Recruiting Rule "limits access by certain speakers to certain potential listeners," and "by restricting the speech of coaches, it limits the most informed speakers on the subject of athletics." App. at 49-B.

within the feeder pattern, clearly favors one set of speakers over others. Such regulation is subject to strict scrutiny. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (government regulation may not favor one speaker over another); *Carey v. Brown*, 447 U.S. at 466 (law favoring labor picketers over other types of protesters subject to strict scrutiny).

E. The Facial Challenge Issue

A facial First Amendment challenge lies in two circumstances: (i) where a regulation, in validly regulating non-expression, infringes on "a substantial amount of speech that is constitutionally protected;" (ii) where a regulation "delegates overly broad discretion to the decisionmaker." *Forsyth County*, 505 U.S. at 130. A government regulation "that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" *Id.* "[P]lacing unbridled discretion in the hands of ... government ... constitutes a prior restraint and may result in censorship" or self-censorship. And "[s]elf-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power." *Lakewood*, 486 U.S. at 757.

Proof of an "abuse of power in the particular case" is not required to make out a facial challenge. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Thus, "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." *Forsyth County*, 505 U.S. at 133 n.10.

1. The court of appeals held that Petitioner "must establish that no set of circumstances exist under

which the Act would be valid." 262 F.3d at 555. In general, that is the standard under *United States v. Salerno*, 481 U.S. 739, 745 (1987). But "[t]hat is not the case ... when the statute regulates speech." *Watchtower Bible & Tract Soc'y v. Stratton*, 240 F.3d 553, 562 (6th Cir. 2001). Because of the concern about chilling expression, a facial First Amendment challenge lies if a significant number of situations exist where, as here, a regulation could be applied so as to prohibit constitutionally protected speech. *Forsyth County*, 505 U.S. at 130; *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

2. The court of appeals' opinion takes the opposite stance, that it should not "strike down a statute on its face where there [are] a substantial number of situations to which it might be validly applied." 262 F.3d at 556 (quoting *Parker v. Levy*, 417 U.S. 733, 760 (1974)). But *Parker* explicitly recognized that, under *Broadrick*, First Amendment doctrine was quite different outside the military context. The "different character of the military community and of the military mission requires a different application" of First Amendment protections. *Id.* at 758. Thus, ***in the very next paragraph*** after that quoted by the court of appeals, this Court distinguished *Broadrick* "for the reasons dictating a different application of First Amendment principles in the military context." *Id.* at 760.

General First Amendment facial challenge doctrine as reflected in *Forsyth County* and *Broadrick* control in this non-military context. Contrary to the assertion of the court of appeals, *Parker*'s "principles are [not] fully applicable to the case before us." 262 F.3d at 557.

3. In rejecting Petitioner's facial challenge, the court of appeals "focus[ed] on how the rule was applied to Brentwood." *Id.* at 556. It stated that there was not "any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *Id.* (quoting *Vincent*, 466 U.S. at 798). But that is not the law with regard

to facial First Amendment challenges. Thus, ***in the very next paragraph*** in *Vincent* after the one quoted by the court of appeals, this Court stated that it ***has*** "recognize[d] an exception to this general rule for laws that are written so broadly that they may inhibit the constitutionally protected speech of third parties." 466 U.S. at 798.

With regard to First Amendment interests, "the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected." *Id.* So, a facial challenge will lie when there is a real and substantial risk to First Amendment values from enforcement of a statute, even if the statute can be applied validly in some situations and even if the First Amendment jeopardy attaches only to "parties not before the Court." *Id.* at 801. The court of appeals' rejection of a facial challenge was erroneous and is worthy of review in this Court.

The court of appeals would broadly foreclose facial First Amendment challenges; this Court's cases go in the opposite direction, facilitating such challenges because of the threat of censorship and self-censorship.

"The First Amendment prohibits the vesting of ... unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133. A party challenging a law based on such unbridled discretion "may challenge it facially without the necessity of first" subjecting itself to the exercise of that discretion. *Lakewood*, 486 U.S. at 755-56. Petitioner, therefore, can bring a facial challenge to the Recruiting Rule quite apart from "how the rule was applied to Brentwood." In the special circumstance of a facial First Amendment challenge, "the Court has altered traditional rules of standing to permit ... [l]itigants ... to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from ... protected speech or expression." *Broadrick*, 413

U.S. at 612. Thus, the court of appeals erred by "focusing on how the rule was applied to Brentwood." 262 F.3d at 556.

4. "The First Amendment prohibits the vesting of ... unbridled discretion in a government official." *Forsyth County*, 505 U.S. at 133. The court of appeals concluded that, "[a]lthough the recruiting rule by itself is certainly subject to challenge," the "interpretive commentary" saves it from facial challenge on grounds of excessive discretion. 262 F.3d at 557. The court of appeals has seriously misinterpreted the rule and the doctrine.

The interpretive commentary sets forth a set of *per se* rules of illegality. These guides expressly are (Question 4) not limits on or substitutes for the underlying "undue influence" standard but specific examples of what constitutes a violation of that standard. App. at 7-B. TSSAA remains free to apply the underlying "recruiting rule by itself," with all the unbridled discretion the district court found so troubling, and the Executive Director retains his unfettered discretion to exercise his plenary waiver authority.

Vague rules, and the discretion they give to government officials, are objectionable (on due process grounds) because of the lack of notice they provide. But, even more importantly in the First Amendment context, they are problematic because they (a) encourage self-censorship and (b) make it difficult on an "as applied" basis to distinguish between legitimate regulatory conduct and the "illegitimate abuse of censorial power." *Lakewood*, 486 U.S. at 757-59. While the "interpretive commentary" may provide notice about specific prohibitions of the rule, it does nothing to restrain the "unbridled discretion" of TSSAA in its implementation of the underlying "undue influence" standard of the Recruiting Rule itself. The issue of discretion and Petitioner's ability to challenge that "unbridled discretion" as a facial First Amendment violation is well worth this Court's attention.

F. The "Pure Speech" Issue

The basis for TSSAA's disciplinary action was the fact of communication about lawful activity (spring football practice). The communications were not overreaching, coercive or threatening; they were merely informative. Thus, the Recruiting Rule bars and punishes "the fact of communication," not just some "separately identifiable conduct." *See Cohen v. California*, 403 U.S. 15, 18 (1971). Sending a benign, informative letter (with similarly benign follow-up phone calls), by themselves, violated the rule.

In comparable circumstances, the Attorney General has declined to enforce federal law that prohibits disclosure of information about lawful conduct on the ground that such enforcement would violate the First Amendment. *See Magee v. United States*, 93 F. Supp.2d 161 (D.R.I. 2000); *N.Y. State Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998). This is the regulation of "pure speech" and, under *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1761 (2001), is subject to strict scrutiny even if the regulation itself is content-neutral. This case provides a good vehicle for developing the "pure speech" doctrine announced last Term in *Bartnicki*.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

H. Lee Barfield II
Counsel of Record
BASS, BERRY & SIMS PLC
315 Deaderick Street
Suite 2700
Nashville, TN 37238
(615) 742-6200

James F. Blumstein
VANDERBILT UNIVERSITY
SCHOOL OF LAW
209-B Law Building
Nashville, TN 37240
(615) 322-2613

Attorneys for Petitioner